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GETTING THE DEAL THROUGH

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Using non-competes and other restrictive covenants globally

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The environment for businesses with global operations is changing – quickly, substantively and permanently. As globalisation and employee mobility continue to increase, we are frequently asked by employers whether non-compete or other restrictive covenants (such as a covenant against the non-solicitation of customers or employees) are enforceable in a particular jurisdiction. The issue arises in a variety of contexts, including when a company is considering hiring a candidate whose employment contract includes a non-compete, whether to include a non-compete in an executive employment contract or other employment agreement (such as a share or bonus plan) and, increasingly as the economic situation improves, whether a non-compete can be enforced against a departing employee. As the war for talent increases, employers, especially in service-based and information industries, understandably wish to protect themselves against the risk that their employee talent will, after building valuable relationships with customers and having access to the employer's confidential information and intellectual property, go to work for a competitor.

One size fits all?

Global employers are keen to have documents and policies that are consistent and similar in all of the countries where they operate so as to reduce the administrative burden and foster a common culture and approach. Accordingly, such employers are often tempted to roll out globally the form of non-compete and other restrictive covenants that are used in the 'home' jurisdiction. While such an approach meets the desired aim of consistency and can have a deterrent effect on employees, it is very risky from an enforcement perspective.

The reason for this is that the enforceability of non-compete or other restrictive covenants usually depends on the law of the jurisdiction where the employee works. Restrictive covenant enforceability standards vary widely from country to country, as every jurisdiction seeks to balance the competing interests of employers, employees and the general public. With each jurisdiction balancing these interests in its own particular way, a global employer has to accept that a 'global' non-compete will be unenforceable in many jurisdictions, as it will encounter a wide variety of restrictive covenant enforceability standards across its worldwide operations.

Accordingly, the best approach for a global employer wishing to impose restrictive covenants that are likely to be enforceable on its employees is to have carefully drafted restrictions for each separate jurisdiction. Because enforceability rules differ markedly across jurisdictions, standard restrictive covenant provisions that are perfectly appropriate for one place will not necessarily be enforceable even within the same geographic region. A non-compete form that works in Malaysia may not work in Singapore; a non-solicitation of customers clause in a German contract may omit clauses necessary in France. The moral is that even region-specific restrictive covenants (eg, a form that is used in Europe or Latin America) are unlikely to be effective.

That said, there are common themes across jurisdictions and regions. In most countries, an employer looking to enforce restrictive covenants will need to show that it is seeking to protect legitimate business interests such as customers, employees and confidential information. Similarly, the duration of the restriction is an important consideration, although what is considered reasonable and, therefore, permissible varies widely from jurisdiction to jurisdiction. An important factor is whether payment is required for the duration of the restriction.

A global employer should start by analysing whether the proposed restriction is enforceable at all in the relevant jurisdiction. For example, in a number of jurisdictions including Chile, India, Russia and Mexico, non-competes in an employment context are, for the most part, void. As a general principle, even in jurisdictions where non-competes are permissible, the courts will more readily enforce a non-solicitation of customers covenant than a pure non-compete. Even if a particular type of restriction is capable of being enforced in a certain jurisdiction, it is important to ensure that it is tailored to the relevant type of business or industry and to the type of employee. In very few, if any, jurisdictions will one form of restrictive covenant be suitable for all employees. A restrictive covenant suitable for a CEO will probably not be enforceable against an IT project manager; a covenant suitable for a sales professional may not be suitable for an accounts clerk.

Garden leave as an alternative?

Some global employers are looking to use a technique that has become common in the United Kingdom to sidestep restrictive covenant enforceability barriers. Restrictive covenants are designed to apply after the employee's employment has terminated. The technique, known as 'garden leave' (or 'gardening leave'), effectively converts post-termination restrictions into 'during-employment' restrictions. This involves keeping the employee employed and continuing to provide pay and benefits but excusing the employee from his or her work duties and responsibilities for the proscribed period, which thereby allows the employee to spend time in his or her garden. As the employee remains employed, the employer can forbid him or her from competing, soliciting or contacting customers and fellow employees and stop his or her access to confidential information. In the United Kingdom and some other countries that have notice periods in the employment contract, the garden leave period is the employee's notice period. In the United States, it is a period equivalent to the non-compete period after what would otherwise have been the employee's separation date. The theory behind garden leave is that courts in most jurisdictions look more favourably on restrictions during employment than restrictions after employment, and that garden leave therefore simplifies restrictive covenant enforcement. The clear downside, however, is that it is expensive – the employer has to continue to provide salary and benefits for the garden leave period but gets no work in return.

The country sections of this report will give specific guidance on the law relating to restrictive covenants. What follows is a broad summary of the key issues in a few regions.

Europe

In most European jurisdictions, restrictive covenants are considered to be a restraint of trade, unless they are considered reasonable in the circumstances. To assess reasonableness, a four-stage test is usually applied and a restrictive covenant will only be enforceable if:

- it is limited in geographic scope;
- it is limited in duration, although the permissible duration varies from country to country with, for example, six to 12 months in the United Kingdom but 12 to 24 months in France;
- it seeks to protect a legitimate business interest such as confidential information or customer connection; and
- ongoing compensation is paid during the restricted period. The amount of compensation required, however, varies among countries and is not necessary at all in the United Kingdom or Switzerland.

Asia
In most Asian countries, post-termination restrictions are typically enforceable, provided they are reasonable. The reasonableness considerations are similar to those applied in Europe. Ongoing compensation during the restricted period is typically not required in most Asian countries, although compensation of between 20 and 60 per cent is required in most Chinese provinces. What is considered a reasonable duration for a restrictive covenant varies so that, for example, in Singapore a restricted period of one year may be enforceable, but only three months would be considered reasonable in Hong Kong.

Latin America
In Latin America, there are significant differences in the approach to restrictive covenants from country to country. For example, non-compete covenants are likely to be enforceable in Argentina, Peru and Venezuela if they are restricted in time and the employee receives reasonable consideration for temporarily waiving his or her constitutional right to work. Although non-competition and non-solicitation covenants are becoming more common in Brazil, Brazilian labour law still does not regulate them expressly. Brazilian case law interprets that non-compete clauses can be valid for up to 24 months, provided that the employee is reasonably indemnified (at least 50 per cent of the last monthly salary) for the non-compete period. In other countries, such as Mexico, Chile and Colombia, non-competes are very likely to be unenforceable.

Middle East
In Saudi Arabia, non-competes are enforceable for up to two years and there is no need for payment of compensation. In the United Arab Emirates, injunctive relief is unobtainable from UAE courts, so non-competes and other restrictive covenants are of little use, although it is possible to use Ministry of Labour administrative processes to prevent an employee from working. If the business operates in the Dubai International Financial Centre (DIFC) and other free zones, non-competes can be enforced in the DIFC and other free-zone courts.

United States
The law on restrictive covenants is a matter of state, not federal, law. Restrictive covenants are liberally enforced in some states but are considered void in others, such as California. Most states recognise as valid and will enforce a covenant not to compete, solicit or deal, provided that the covenant is supported by adequate consideration, necessary to protect a legitimate business interest such as trade secrets or customer connection, and reasonable in time, subject matter and geography. There is generally no requirement to pay an employee while he or she is subject to a restrictive covenant.

Conclusion
It is clear that employee restrictive covenants are a vital tool for global employers in a world where globalisation and employee mobility continue to gather pace. But global employers seeking to craft enforceable restrictive covenants across national boundaries will have to be prepared to take a sophisticated and multi-faceted approach. They must be willing to accept that this is an area of law that demonstrates the weakness of a one-size-fits-all approach. The enormous variation among jurisdictions regarding the enforceability of restrictive covenants means that global employers will be confronted with a bewildering array of restrictive covenant enforceability standards. The most practical strategy is to craft restrictive covenants that conform to the various jurisdictions in which they operate. Global employers should focus on where their employees are actually working, as this is where they will likely want to be enforcing the restrictive covenants.

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